Supreme Court, U.S.
FILED
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NO. 89-1862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANIEL J. McCARTHY, Petitioner,

v.

ROULETTE BLAIR, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO CALIFORNIA ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States
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RE: Daniel McCarthy v. Roulette Blair
CASE NO. 89-1862

Dear Clerk:

Enclosed please find one original and two copies of OPPOSITION TO CALIFORNIA ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI and MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS for filing. Please return one conformed copy in the return envelope provided. Thank you.

Sincerely,

POTTER & COHEN

Wendy Fan
Clerk to Paul W. Potter

Enclosures

NO. 89-1862

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THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

NO. 89-1862

DANIEL J. McCARTHY, Petitioner,

vs.

ROULETTE BLAIR, Respondent.

OPPOSITION TO CALIFORNIA ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Daniel J. McCarthy, Warden and the California Attorney General, pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 27, 1989 and amended on February 27, 1990. A petition for re-hearing was denied by the Court of Appeals on March 26, 1990.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 881 F2d 602 and is attached as Appendix "1" to the Petition for a Writ filed by Petitioner. The order denying the petition for rehearing in the 9th Circuit is attached thereto as Appendix "2".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., section 1254 (1) and (2).

STATEMENT OF THE FACTS

Respondent was charged in Los Angeles County with one count of violation of the California Health and Safety Code, Section 11351(a), possession of codeine for sale.

Respondent entered a guilty plea on May 23, 1983 for a bargained for sentence of probation (Docket 6).

He was sentenced, on June 21, 1983 to State Prison. That sentence was suspended and Respondent was placed on probation.

On December 11, 1984 Respondent was arrested for a probation violation. (Docket No.: 1, p. 6a.)

Respondent was initially sentenced to state prison for four years, but the sentence was later corrected and set at three years. (Docket No.: 6 Exh. I.)

On March 3, 1986, Respondent was released on parole. (Docket No. 1, p 6b.)

Respondent was arrested as a parole violator on August 20, 1986. (Docket No. 1, pp. 6a-6b.)

While in custody on a parole violation, respondent filed a federal petition for a Writ of Habeas Corpus under 28 U.S.C. Section 2254. (Docket No.1)

An evidentiary hearing was held. The Magistrate found that the Respondent was a credible witness and that he was unaware of the parole requirements at the time he entered his guilty plea and that if he had known about the parole requirements he would not have pleaded guilty. (Docket 16)

On October 27, 1987, the Honorable William J. Rea, United States District Judge adopted the Magistrate's Report and Recommendation and granted the Petition.

On November 24, 1987, the California Attorney General appealed.

On March 27, 1989, the United States Court of Appeals for the Ninth Circuit upheld the District Court.

On March 26, 1990, the Ninth Circuit denied the California Attorney General's petition for a rehearing.

On May 2, 1990, the California Attorney General petitioned this Honorable Court for a Writ of Certiorari.

On June 27, 1990, this Honorable Court ordered counsel to file a response.

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REASON FOR DENYING THIS PETITION

I

THE DISTRICT COURT CORRECTLY FOUND THAT THE RESPONDENT WAS UNAWARE OF THE COLLATERAL CONSEQUENCES OF HIS PLEA AND THAT HAD HE BEEN AWARE OF THESE CONSEQUENCES HE WOULDN'T HAVE PLEADED. THIS DETERMINATION SHOULD BE LEFT UNDISTURBED.

This case is not about retroactivity. It is about fundamental fairness arising out of the Due Process Clause of the Fourteenth Amendment.

In Rule 15 of the United States Supreme Court Rules counsel are admonished to point out any misstatements in Petitioner's Brief, in the Brief in Opposition to the granting of the Writ, lest these misstatements be deemed accepted and any objection's thereto be deemed waived.

At page seven, first full paragraph of the Attorney Gerneral's Petition for a Writ of Certiorari, there appears a significant and material misstatement. The sole issue briefed on appeal was not " The retroactivity of the new bill announced in Carter v. McCarthy ".

Counsel for respondent cited to the Ninth Circuit, as he cites to this Honorable Court inter alia Boykin v. Alabama, infra and Santobello v. New York, infra for the proposition that this case turns on a Federal XIV amendment denial, as recognized by the Seventh Circuit.

The question raised in this case is whether it was

fundamentally unfair to impose an automatic parole term of up to three years upon the Petitioner without specifically advising him of that consequence at the time of his guilty plea. The United States District Court for the Central District of California found, after an evidentiary hearing, that Respondent (then Petitioner) was not aware of that condition and that if he had been, he wouldn't have entered his plea. The District Court, thus, granted the Writ.

The United States Court of Appeal for the Ninth Circuit upheld that grant, albeit on grounds different from those argued by Mr. Blair. This however is within their discretion since an appellate court may affirm the District Court on any basis fairly presented in the record that, as a matter of law, sustains the judgment. Blair v. McCarthy 881 F2d 602, footnote 2 citing United States v. Burnette 698 F2d 1038, 1049 (9th Cir) cert. denied 461 US 936 (1983)

Long ago the United States Supreme Court held that a guilty plea may not be accepted unless the record contains affirmative evidence that it is voluntarily entered by the defendant. Boykin v. Alabama, 395 U.S. 238, 243-244, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). The court also stated that a trial court must employ "utmost solicitude. . . in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and to its consequences". Id., page 244.

In circumstances where a guilty plea "rests in any significant degree in a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled". Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). A criminal defendant

who has entered a guilty plea in reliance upon a promised sentence may thus seek to enforce specific performance of the plea bargain. Id., page 263. The majority opinion in Santobello did not articulate the specific constitutional basis of its ruling. It is fairly clear, however, that the ruling is based upon the guarantee of fundamental fairness arising out of the Due Process Clause of the Fourteenth Amendment. Id., page 267 (Concurring Opinion of Justice Douglas).

California Law imposes a mandatory period of parole "for a period not exceeding three years" upon all prisoners who have been sentenced pursuant to the provisions of California Penal Code, Section 1170. The parole term may be waived by the Board of Prison Terms "for good cause". California Penal Code, Section 3000(a). The Petitioner was sentenced in the present case pursuant to the provisions of California Penal Code, Section 1170. California law specifically requires a court at the time of sentencing to advise a defendant "that as part of the sentence after expiration of the term he may be on parole for a period as provided in [California Penal Code] Section 3000". California Penal Code, Section 1170(c).

A line of cases in the Seventh Circuit has repeatedly held that a state criminal defendant must be specifically advised that a guilty plea will result in the automatic imposition of a mandatory period of parole. In United States ex rel. Baker v. Finkbeiner, 551 F.2d 180 (7th Cir. 1977), an Illinois criminal defendant agreed to plead guilty to certain criminal charges in exchange for a promise that he would serve from one to two years in prison. No mention was made of any parole condition during the guilty plea. Illinois law imposed a mandatory two-year term of

parole upon a person convicted of the crime to which the defendant entered his guilty plea. The defendant then sought Federal habeas corpus relief seeking to annul the parole condition. The court held that the circumstances surrounding the entry of the plea violated the Due Process Clause if the sentence actually imposed upon the Petitioner significantly differed from the sentence which had been promised in the plea proceedings by the prosecutor and the trial court. Id., page 183. The court thus could find a constitutional violation if the mandatory parole term constituted a "substantial addition" to the prison term promised in the plea bargain. Id. The court then found that the two-year parole term constituted a significant additional punishment. The court thus found that the Petitioner's guilty plea was unfairly induced in violation of the Due Process Clause. Id., page 184.

The rule articulated in Baker, supra, has been consistently maintained in the Seventh Circuit. See, e.g., United States ex rel. Williams v. Morris, 633 F.2d 71 (7th Cir. 1980) and United States ex rel. Johnson v. DeRobertis, 718 F.2d 209, 210-211 (7th Cir. 1983).

The fact that there was no case absolutely "on all fours" in the 9th Circuit prior to the decision in Carter v. McCarthy, 806 F2d 1373 (9th Cir. 1986) is not relevant to the decision complained of in the instant Petition. Carter, supra merely restates an underlying rule of Constitutional Law and imposes a duty on trial judges to advise defendants entering guilty pleas of the potential parole consequences of their pleas in order to implement that rule. Nothing in Carter states that a defendant who, in addition to not being advised of a parole term was actually unaware of that parole

term has only a prospective remedy. The Constitutional violation remains the same and the issue was regularly addressed on a case by case basis in the Ninth Circuit prior to that decision.

What is relevant to this case is the fundamental Constitutional unfairness of a plea tendered by the defendant in reliance upon a bargained for result where the sentence turned out to be much harsher than that bargained for.

The parole term imposed upon the Respondent in the present case constituted a substantial addition to the term promised in the original plea bargain.

The conditions of the Respondent's parole constitute significant limitations upon the Petitioner's freedom. The Respondent is forbidden to leave the State of California or to change his place of residence without the prior approval of his parole agent. He must report any change of employment to the parole agent within 72 hours. He and his residence and property may be searched without a warrant by any agent of the Department of Corrections or by any law enforcement officer. He must comply with the instructions of his parole agent.

In addition, the Respondent is subject to further additional time in custody if he violates the conditions of his parole. The Respondent in the present case has actually served a substantial amount of custodial time as the result of parole violations.

The District Court concluded that the parole condition not mentioned in the plea agreement, but which was imposed upon the Respondent, constituted a substantial addition to the term promised in the plea bargain. It was fundamentally unfair to impose this

substantial additional custodial time upon the Respondent as the result of a plea bargain in which the Respondent was not advised of this possibility. The imposition thus violated the Due Process Clause of the Fourteenth Amendment.

To prevail, the Respondent not only had to demonstrate that he was not advised at the time of the plea of the mandatory parole condition, the Respondent had also to demonstrate that he was actually unaware of the existence of the mandatory parole conditions and that he would not have entered a plea of guilty if he had been properly advised or aware. See Wayne v. Raines, 690 F.2d 685, 687 (9th Cir. 1982); Wacht v. Caldwell, 604 F.2d 1245, 1247 (9th Cir. 1979).

He did so successfully.

The Magistrate conducted an evidentiary hearing in this matter. After a hearing, the Magistrate found:

1. At the time of the guilty plea, the Respondent did not know that he would be required to serve a parole term after he completed his prison sentence; and
2. The Respondent would not have entered the guilty plea had he known about the parole condition.

The Magistrate summed up his reasoning as follows:

This Magistrate held an evidentiary hearing on September 30, 1987, at which the Petitioner (now the Respondent) testified that he would not have entered a plea of guilty had he know of the parole requirement. The Magistrate believes that testimony.

Excerpts - Docket No.: 16

It is crystal-clear that this is a factual determination, which the California Attorney General accepts:

> **Respondent (now the petitioner) concedes that when Petitioner entered his guilty plea he was not informed of the mandatory three year period of parole pursuant to California Penal Code Section 3000 (a). Respondent accepts the findings of fact made by the Magistrate and adopted by the District Court that Petitioner would not have entered a plea of guilty had he know of the parole requirement. (California Attorney General's Opening Brief in the Ninth Circuit, page 3.)**

> It is well settled that a federal appellate court may set aside a trial court's finding of fact only if they are "clearly erroneous," and that it must give "due regard . . . to the opportunity of the trial court to judge of credibility of the witness." Fed. Rule Civ. Proc. 52(a); see Anderson v. Bessemer City, 470 U.S. 564, 573-576 (1985) (describing clearly erroneous review generally); Wade v. Mayo, 344 U.S. 672, 683-684, (1948) (applying clearly erroneous review in federal habeas proceedings). We have stressed that the clearly erroneous standard of review is a deferential one,

explaining that " if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighted the evidence differently." Amadeo v. Zant, 43 C.R.L. 304 3.4 (01988)

The Magistrate's conclusions were supported by the record. His evaluation of the case was adopted by the United States District Court, whose determination was left undisturbed by the Court of Appeals for the Ninth Circuit. This Decision should remain undisturbed.

CONCLUSION

For all of the foregoing reason, the decision of the District Court was upheld. Mr. Blair has been relieved of the parole condition to which he was unconstitutionally subjected and the Petition for a Writ of Certiorari should be denied.

DATED: July 26, 1990

Respectfully submitted,

Paul E. Potter

PAUL E. POTTER
Attorney for Roulette Blair

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to this action. My business address is 3852 East Colorado Boulevard, Pasadena, California 91107.

On July 27, 1990 , I served the following document described as **OPPOSITION TO CALIFORNIA ATTORNEY GENERAL'S PETITION FOR WRIT OF CERTIORARI** on within parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

1) Roulette Blair
C-99761
3B05 #137U
P.O.Box 3466
Corcoran, CA 93212-8310

2) William Robert Weisman, ESQ.
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90010

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Pasadena, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on July 27, 1990 at Pasadena, California.

Wendy Fan
Clerk to Paul E. Potter